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Supreme Court, U.S.
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No. : 06-156

In the
Supreme Court of the United States

CASILDA E. ROPER-SIMPSON,

Petitioner-Appellant,

-against-

BARRY C. SCHECK, JOHNNIE L. COCHRAN, SANFORD RUBENSTEIN, THOMAS & FIGEROUX, and ESTATE OF CARL W. THOMAS,

Respondents-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

In a claim by one set of attorneys, who represented Abner Louima in his infamous police brutality case against the City of New York, seeking forfeiture to themselves, of the fees of the original attorneys who represented Mr, Louima, the Second Circuit affirmed the district court's grant of relief. The Second Circuit affirmed despite the fact that: a) the attorneys seeking forfeiture did not allege any injury to themselves; b) they only alleged that petitioner and her colleagues caused injury to Louima; and c) Louima did not authorize the forfeiture claim, and did not know that the Respondents had divided the prospective forfeited fees among themselves. The Second Circuit also affirmed the district court's decision to allocate fees between the petitioner and T&F, despite the fact that this issue had been resolved by these parties, and was no longer "live".

Three questions are presented:

1. Under Article III, do attorneys, who did not allege any injury to themselves, and who were not authorized by the client, have standing to seek forfeiture to themselves, of their co-counsel's fee from the client, based solely upon injuries allegedly done by their co-counsel to the client?

2. Does a federal court have jurisdiction to adjudicate such a fee forfeiture claim in the absence of a showing of standing?

3. In light of the 'case or controversy' requirement of Article III, does a federal court have the authority or jurisdiction to decide an issue which had been rendered moot by the parties before the court?

LIST OF PARTIES

The petitioner in this Court is Casilda E. Roper-Simpson, an attorney duly licensed to practice law in the State of New York at all times relevant to this matter. Petitioner, Carl W. Thomas (deceased) and Brian Figeroux, were the original attorneys who began to provide legal representation to Abner Louima in the immediate aftermath of his brutal encounter with New York City police officers in August 1997. Mr. Thomas and Mr. Figeroux practiced as Thomas & Figeroux. Barry C. Scheck, Johnnie L. Cochran (deceased) and Sanford Rubenstein, were, together with Peter Neufeld, attorneys who subsequently joined Abner Louima's legal team.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Second Circuit did not issue a formal opinion but instead, issued a Summary Order. Said Summary Order was later issued as a Mandate and both are reproduced here as Appendix C. The District Court opinion granting relief, which incorporates the Report and Recommendation of Magistrate Judge Pollak, is reproduced as Appendix B. And excerpts of the relevant portions of the Report and Recommendation ("R&R") are reproduced as Appendix A. The Second Circuit's Order on the Petition for panel and/or *en banc* reconsideration is reproduced as Appendix D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Second Circuit's Summary Order was entered on January 20, 2006, and a timely petition for panel or *en banc* rehearing was filed. Said petition for rehearing was denied by the Second Circuit on April 3, 2006. See Appendix D.

The District Court claimed jurisdiction over this attorney fee claim, which does not involve any fee dispute with the client, as ancillary to its power to regulate attorney admission and withdrawal. Alternatively, the District Court claimed jurisdiction over this fee claim by one set of attorneys against another set, on the basis of the doctrine of supplemental jurisdiction. A189-191[1]. It is doubtful

[1] "A" refers to the Appendix in the Second Circuit Court of Appeals.

whether this is sound in light of the fact that the main case involved the client, Louima, who is not a party to the fee dispute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article III:

Sect.1. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme court and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Sect.2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a state and citizens of another state, between citizens of different States, between citizens of the same state claiming lands under grants of different States, and between a state, or the citizens thereof, and foreign States, citizens or subjects.

.....

STATEMENT OF THE CASE

This is an unusual fee dispute among attorneys which arose out of the August 1997 infamous Abner Louima police brutality incident in New York City. This fee dispute is very unusual because Louima, the client, did not seek forfeiture of counsel's fee, and did not authorize the attorneys seeking relief to do so on his behalf. Moreover, the attorneys seeking relief did not allege any injury to themselves: they did not allege that the Petitioner and her colleagues had caused them any injury. The sole basis on which these attorneys sought forfeiture of their co-counsel's fees is the allegation that Petitioner and her colleagues had caused injury to Abner Louima, a third-party to the fee dispute. A56-A74.

Following Abner Louima's brutal attack by New York City police officers in August 1997, his family tried unsuccessfully for several days, to retain the services of an attorney to represent his interests. At that time, the police had already embarked on a vicious campaign against Louima, labeling him as the victim of rough gay sex.

At great professional and personal risks, and without any fee deposit, the Petitioner and her colleagues, Carl W. Thomas and Brian Figeroux, agreed to represent the then unknown Louima, both in the criminal charges brought against him by the police, and his potential civil rights lawsuit against the police. Petitioner and her colleagues brought Louima's situation to the attention of the United States Attorney for the Eastern District of New York. They also brought Louima's plight to the attention of the general public by involving the press through the late Mike McAlary of the Daily News newspaper.

After public interest in Louima's plight had been generated, Sanford Rubenstein insinuated himself into the

case as part of Louima's legal team. Not long thereafter, the late Johnnie L. Cochran came along, bringing with him, Barry C. Scheck and Peter Neufeld, as co-counsel. Ultimately, Louima and his wife executed one final written retainer agreement with all his attorneys. Under that written retainer, one-third of the total attorney's fee would go to Cochran, Neufeld and Scheck ("CN&S"); one-third to Rubenstein; and one-third to Thomas & Figeroux ("T&F"). It had been agreed between Petitioner and T&F that the Petitioner would share equally with T&F whatever fees were due to T&F.

Events surrounding how CN&S and Rubenstein (herein together referred to as "Cochran Respondents") became attorneys in Louima's case caused an uneasy working relationship among the attorneys, especially between CN&S and T&F. Rather than improve over time, this poor working relationship worsened. Eventually, the Petitioner, Carl W. Thomas and Brian Figeroux had to leave the case.

Louima's civil rights lawsuit was resolved by negotiated settlement without a trial. Meanwhile, the Cochran Respondents, without the authority of their client, Louima, brought a motion seeking to forfeit the entire fee due to T&F and the Petitioner from Louima's case. Also, without Louima's knowledge, the Cochran Respondents agreed among themselves to retain any windfall which might result from the forfeiture of the fees of T&F and the Petitioner. A1020-1021; A1235-1236; Plaintiff's Exhibit 5. The only ground advanced by the Cochran Respondents for seeking this unusual relief is their allegation that Petitioner and T&F had committed various wrongs which caused injury to Louima. The Cochran Respondents never alleged that the Petitioner or T&F did any wrong to them, or that they

suffered any injury as a result of the conduct of the Petitioner and T&F. A56-A74.

In her responsive pleading, Petitioner challenged the standing of the Cochran Respondents to seek forfeiture to themselves of her fees and those of T&F. A75-A90. The Cochran Respondents never amended their pleading to reflect an alternative basis for the forfeiture relief sought. Therefore, the fee dispute proceeded to hearing in the District Court on the basis of this alleged injury to third-party Louima. Prior to the commencement of the fee hearing, the Petitioner and T&F had disagreed as to the respective percentage share of fee as between the Petitioner and T&F. However, during the hearing, the Petitioner and T&F resolved that the Petitioner was entitled to equal share of the fee due to T&F. Thereafter, this agreement was confirmed by the attorneys for T&F in a letter dated May 23, 2003, addressed to Magistrate Judge Pollak, and copied to all counsel of record. A291. Said letter is reproduced here as Appendix E.

That letter of May 23, 2003, confirmed the mootness of the fee dispute, as between the Petitioner and T&F. The only claim left unresolved was the fee forfeiture claim of the Cochran Respondents against the Petitioner and T&F. Despite the mootness of the fee dispute between T&F and the Petitioner, one year later, Magistrate Judge Pollak issued her Report and Recommendation ("R&R") in which she purported to decide a non-existent fee dispute between the Petitioner and T&F. Excerpts of the relevant portions of the R&R are reproduced here as Appendix A. The complete R&R is found in the record on appeal. A91-A264. Judge Sterling Johnson of the District Court issued his decision on September 28, 2004, accepting part of the R&R which included the improper resolution of this moot point. The District Court decision is reproduced here as Appendix B.

Petitioner filed her timely Notice of Appeal on October 13, 2004. A1785-A1786. The Second Circuit affirmed the District Court in a Summary Order issued on January 20, 2006. Appendix B hereto. Petitioner filed a timely petition for panel rehearing and/or rehearing *en banc* on February 3, 2006. The petition for rehearing was denied on April 3, 2006. Said Order of denial is reproduced here as Appendix D.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Decision of the Second Circuit Violates the Case or Controversy Clause of Article III, and Undermines this Court's Established Precedents on the Doctrine of Mootness

The District Court improperly decided a moot point when it purported to resolve a non-existent dispute between the Petitioner and T&F. And the Circuit Court erred in affirming same. The "case or controversy" clause of Article III of the United States Constitution forbids federal courts from deciding moot questions. And this Court has so construed and interpreted same in a long line of precedents. See e.g. Bunting v. Mellen, 541 U.S. 1019 (2004); Frank v. Minnesota Newspaper Ass'n, 490 U.S. 225 (1989); Sosna v. Iowa, 419 U.S. 393 (1975). A question is moot where the issues involved have ceased to exist or are no longer "live". Murphy v. Hunt, 455 U.S. 478, 102 S.Ct. 1181, 1182, 71 L.Ed.2d 353 (1982); County of Los Angeles v. Davis, 440 U.S. 625 (1979).

In affirming the District Court, the Second Circuit stated that it found:

"no abuse of discretion in the district court's denial of an equal division of fees as between Roper-Simpson and

Thomas & Figeroux, notwithstanding a fee-sharing agreement between the two parties. Magistrate Judge Pollak found that the precise terms of the agreement itself are unclear. Moreover, the agreement itself is unenforceable under New York law because it was made without informing the client", citing Naiman v. N.Y. Univ. Hosps. Ctr., 351 F. Supp. 2d. 257 (S.D.N.Y. 2005) (emphasis added).

The Second Circuit erred. Magistrate Judge Pollak issued her R&R on July 21, 2004. A91-A264. One year prior to the issuance of the R&R, the issue of the division of fees as between Roper-Simpson and Thomas & Figeroux, had been rendered moot. A291-A292. See Letter dated May 23, 2003, reproduced here as Appendix E. Therefore, after May 23, 2003, there was no longer any fee dispute between the Petitioner and T&F, which the court was required to resolve or decide. The Circuit Court's decision creates a conflict, not only with that Court's previous decisions but also with the decisions in all the other Circuits. Catanzano v. Wing, 277 F.3d 99 (2d Cir. 2001); Etuk v. Slattery, 936 F.2d 1433 (1991). Furthermore, the Second Circuit's reliance on Naiman is unavailing. While Naiman dealt with an ***attorney/client fee dispute***, this case deals with a ***fee dispute among attorneys.*** There is no fee dispute whatsoever between Louima, on the one hand, and the Petitioner and T&F, on the other. It is the New York State court, and not the District Court which decided Naiman, that can pronounce on what New York law is. DiBella v. Hopkins, 403 F.3d 102 (2d Cir. 2005); The Travelers Insurance Co. v. 633 Third Associates, 14 F.3d 114 (2d Cir. 1994). The New York State Court of Appeals recognizes a distinction between an attorney/client fee dispute and a fee dispute among attorneys only, like the one at bar. See, Lai Ling Cheng v. Modansky Leasing Co., 73 N.Y.2d 454, 458 (1989) ("Where the dispute is only between attorneys, however, the rules are somewhat

different"). See also, Kern v. Karnbach, 27 A.D.2d 954, 279 N.Y.S.2d 252 (2d Dept. 1967).

The case of Warren v. Meyers, 187 Misc.2d 668, 723 N.Y.S.2d 337 (2001), is very instructive indeed. Warren is a medical malpractice contingency *fee* case in which an attorney who was retained by the client on a contingency engaged another attorney. The retained attorney, Jones, engaged the Gallina firm to work with Jones on the client's case. The client never formally retained the Gallina firm, but knew that the Gallina firm was working on his behalf with Jones. The plaintiff in Warren testified that "he did not believe that he ever directly retained the Gallina firm and assumed that Jones, whom he did retain, and the Gallina associate with whom he had been working, Louis Solimano, Esq., were partners". *Id*, at 340. The court held that Jones, the retained attorney, had a direct right to a fee from the client, and that the Gallina firm was entitled to a share of the fee, **as agent of Jones**. *Id*., at 342 (emphasis added).

In the case at bar, Louima, the client, never formally retained the Petitioner, just like the client in Warren who never formally retained the Gallina firm. In both cases, there was no written retainer agreement between the client and the attorney engaged by the retained attorney. Like in Warren, Louima retained T&F who engaged Petitioner, and knew that the Petitioner was working on his behalf.

Louima testified that he first met the Petitioner at the time he first met Carl Thomas and Brian Figeroux; that Messrs. Thomas and Figeroux told him that the Petitioner "was working with them" and that he, Louima, understood that to mean that "they were together and working as one lawyer". A99. The case at bar in indistinguishable, in principle, from Warren where recovery was permitted to the Gallina firm. The Gallina firm in Warren was in an identical situation as the Petitioner at bar.

Assuming, *arguendo*, that the issue of division of fees between Thomas & Figeroux and Petitioner were not moot, Roper-Simpson would still be entitled to equal share of the fee of Thomas & Figeroux, based upon the record. The evidence is that Roper-Simpson did "some work" in connection with the Louima case, and that she did not refuse to make any more substantial contribution to the case. A835-836. Indeed, the district court found that "There has been no evidence of any ethical violations by Ms. Roper-Simpson, who appears to have acted in Louima's interest at all times and did not have any discussions with the press that were not authorized". A228.

In light of the fact that Petitioner did "some work" in the underlying contingency fee civil rights case, and there is no claim by the Cochran Respondents, or any other attorney in the Louima case, that Petitioner refused to make any more substantial contribution, New York courts will not inquire into the precise worth of the services. Benjamin v. Koeppel, 85 N.Y.2d 549, 626 N.Y.S.2d 982 (1995). Given this fact, and the additional fact that T&F had already conceded that Petitioner is entitled to equal share of their fees, the District Court no longer had a discretion in the matter. The Circuit Court was bound to follow Alderman v. Pan Am World Airways, 169 F.3d 99 (2d Cir. 1999). By affirming the district court on this issue, the Second Circuit failed to follow this Court's established precedents on the doctrine of mootness. What is more, without any explanation, the Circuit Court failed to follow its own controlling decision in Alderman.

B. The Second Circuit Affirmed the District Court Despite the Clear *Lack of Standing* By the Party Who Sought Relief, and in Violation of Article III Standing Requirements and This Court's Precedents on Standing

The Second Circuit concluded that, the Cochran Respondents, who did not allege any injury to themselves, have standing to seek to forfeit to themselves, the fee of T&F and Petitioner. This conclusion is contrary to the settled law in this Court, as well as precedents in every other Circuit Court. The Cochran Respondents, as the party asserting federal jurisdiction, bear the burden of establishing their standing under Article III of the Constitution. This Court presumes that federal courts lack jurisdiction unless the contrary appears affirmatively from the record. Renne v. Geary, 501 U.S. 312, 111 S. Ct. 2331, 115 L.Ed.2d 288 (1991). A party seeking relief must plead facts showing that it has standing to assert its claim. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231, 107 L.Ed. 2d 603, 110 S.Ct. 596 (1990).

By its decision, the Circuit Court appears to suggest that a party is entitled to seek relief in federal court without the threshold showing of standing to seek that specific relief. Cf Warth v. Seldin, 422 U.S. 380. It is settled law that the issue of standing must be seen in relation to the nature of the claim asserted. DaimlerChrysler Corporation v. Cuno, 126 S.Ct. 1854 (2006); 164 L.Ed.2d 589; Etuk v. Slattery, 936 F.2d 1433 (2d. Cir. 1991).

The Cochran Respondents articulated their position thus:

"This motion to invalidate the claims to legal fees by Messrs. Thomas and Figeroux, as well as Ms. Roper-Simpson, is made because the conduct of counsel in this case has been so thoroughly contrary to the interests of Mr. Louima, and so contrary to the ethical norms of the legal profession, that it would be a mockery to the legal system, and a great disservice to Mr. Louima and the suffering he has endured, to reward such misconduct" (emphasis added). (A59).

They further stated:

"As set forth below, Messrs. Thomas and Figeroux violated their fiduciary and ethical duties to **Mr. Louima** in three core areas. First, they withdrew from representing **Mr. Louima** without cause; second, they violated their duty to keep **client** information confidential; and third, their willful and unauthorized disclosure of confidential and secret **client** information not only **violated Mr. Louima's instructions,** but also could have significantly injured the interests of their clients in this case" (emphasis added) (A60)[2].

By affirming that the Cochran Respondents had standing to seek forfeiture to themselves, of the fees of their co-counsel, the Circuit Court ignored the facts pleaded by the Cochran Respondents in the District Court for seeking relief. First, they brought the forfeiture motion in their own name. Second, they were seeking to have the fees forfeited to themselves, and not to Louima. Third, they alleged injury to

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[2] Cochran Respondents who seem overly concerned about the alleged ethical violations of Thomas & Figeroux did not report these alleged violations to the Disciplinary Committee of the Bar as they were obligated. Instead, their focus was not even to benefit Louima who suffered these alleged injuries, but to enrich themselves at the expense of Roper-Simpson and Thomas & Figeroux.

Louima, and not themselves, as the only basis for seeking relief. This Court has held repeatedly that a party must plead facts showing that it has standing to assert its claim. In order to have standing, a party must allege a distinct and palpable injury to himself, and cannot rest his claim to relief on the legal rights or interest of third parties (Emphasis added). Warth v. Seldin, 422 U.S. 490, 501, 45 L.Ed.2d 343, 95 S. Ct. 2197 (1975). See also, Kowalski v. Tesmer, 543 U.S. 125 (2004).

Nowhere in their fee motion - the pleading which defines and circumscribes the nature and basis of the relief sought - did the Cochran Respondents ever allege any "distinct and palpable injury" to themselves. Rather, all the injuries which they alleged were done to **Louima** - a non-party to the fee dispute. The Cochran Respondents, as the party seeking relief, rested their claim for relief on Louima's legal interests, and not their own. A56-A74. In her response to the forfeiture motion in the District Court, Petitioner herein challenged the standing of the Cochran Respondents to seek relief for themselves on the basis of injury allegedly done to Louima, a third-party. A75.

The Circuit Court bottomed its finding of standing on the reasoning that all the parties stand to lose or gain financially from the division of fees. Again, insofar as this conclusion extends to the Cochran Respondents, the Court erred. The Petitioner herein had standing in the district court because the Cochran Respondents impleaded her in their motion seeking forfeiture of attorney's fees, including Petitioner's fee. The decision of the District Court on the fee motion was unfavorable to the Petitioner. As such, Petitioner was an "aggrieved party", and had standing to appeal that unfavorable District Court decision. See: Deposit Guaranty National Bank of Jackson, Mississippi v. Roper, 445 U.S. 326; 100 S. Ct. 1166; 63 L.Ed.2d 427

(1980); Concerned Citizens of Cohocton Valley, Inc., v. New York State Department of Environmental Conservation, 1997 U.S. App. LEXIS 36155 (2d Cir. 1997).

Parties are bound by their pleadings. Moreover, issues not raised before the district court are waived. See Telecommunications, Inc. v. Commissioner, 104 F.3d 1229, 1232-33 (10th Cir. 1997). The Cochran Respondents are bound by the only pleaded factual basis for their claim of forfeiture in the District Court - injury to Louima and not to themselves. The Circuit Court had no authority to fashion for the Cochran Respondents a claim which they did not make for themselves. In other words, the Circuit Court could not properly rule that the Cochran Respondents had standing to seek relief because they stand to lose or gain financially from the division of fees since that was never the claim of the Cochran Respondents.

As the parties who invoked the jurisdiction of the district court by seeking relief, the Cochran Respondents bore the burden of satisfactorily demonstrating their standing to seek the specific relief which they were seeking in the District Court. DaimlerChrysler, *Id.* They failed to discharge or carry this burden. Besides, the District Court had resolved the issue of their standing on the basis that the Cochran Respondents could stand in the shoes of Louima - a conclusion that is completely at odds with the hearing record.

Magistrate Pollak stated thus:

"CN&S and the Rubenstein firm essentially stand in the shoes of the Louimas in asserting that T&F's violations of their ethical obligations to their clients were sufficiently egregious to warrant forfeiture of T&F's rights to share the fees". A 212. (Emphasis added).

Magistrate Judge Pollak's invocation of what amounts to the third-party standing exception misconstrues the basis enunciated by this Court for finding third party standing. It also ignores the record evidence in this case. For third party standing to apply, there must be a combination of three situations: 1) the litigant has suffered an injury in fact giving him a sufficiently concrete interest in the outcome of the issue in dispute; 2) the litigant has a close relation to the third party; and 3) there is some hindrance to the third party's ability to protect his or her own interests. See Powers v. Ohio, 499 U.S. 400, 411, 113 L. Ed.2d 411, 111 S. Ct. 1364 (1991), quoting Singleton v. Wulf, (citation omitted). See also, Kowalski v. Tesmer, 543 U.S. 125 (2004). The Cochran Respondents, who did not allege any injury to themselves, failed to meet the case and controversy requirement of Article III.

Leaving aside the Article III case or controversy requirement, the Cochran Respondents also failed to satisfy the prudential considerations which underlie this Court's third party standing jurisprudence. They failed to show that there was such a "close" relationship between them and Louima to invoke third party standing. Moreover, they failed to show that there was a "hindrance" to the ability of Louima, the possessor, to protect his own interests.

In Conn v. Gabbert, 526 U.S. 286, 289-293 (1999), this Court rejected an attorney's attempt to adjudicate the rights of a client. The plaintiff-attorney in Conn, just like the Respondents, failed to assert his own injury in fact as a basis for his standing. Moreover, the record at bar shows that Louima did not authorize the Respondents to seek forfeiture on his behalf. More amazing is the fact that the Cochran Respondents did not even advise Louima that the fee of T&F, which they were seeking to forfeit, had been divided in advance among them the attorneys, without a cent accruing

to the client who was allegedly injured by the conduct complained of. A1020-1021; A1235-1236; Plaintiff's Exhibit 5. The record herein mandates a finding that the Respondents lack any standing to seek said fee forfeiture, whether third party or otherwise. The lower courts should not have reached the merits of the claim without this threshold showing of standing.

C. The Circuit Court Ignored Contemporaneous Evidence Which Undermines Respondents' Later Contention That Petitioner and T&F ***Withdrew Without Cause*** from the Louima Case

While Petitioner and T&F maintain that they were constructively discharged by Louima or withdrew with cause on January 23, 1998, Respondents claimed, for the first time four years later, that Petitioner and T&F withdrew without cause from representing Louima. However, Respondents' contemporaneous conduct, which is part of the record, belies their claim.

On January 23, 1998 - the day that the Petitioner and T&F were forced to resign as Louima's attorneys - Louima wrote a letter which the Respondents helped him draft. In that letter, Louima requested T&F to "**give Sandford Rubenstein an accounting**, within the next month, **for the time** and expenses you **and your colleague Casilda Roper-Simpson have committed on my behalf**" (Emphasis added). A1237; Plaintiff's Exhibit 8. The only rational explanation for this request is a recognition, by Louima and the Cochran Respondents, that the Petitioner and T&F are entitled to fees because they did not withdraw without cause.

Under New York law, an attorney who is discharged for cause or who withdraws from a client's case without cause, is not entitled to any fee. Campagnola v. Mulholand,

76 N.Y.2d 38, 556 N.Y.S.2d 239 (1990). On the other hand, an attorney who is constructively discharged by the client, or who withdraws with cause, from a contingency case is entitled to fees. Martucci v. Brooklyn Children's Aid Soc., 284 N.Y. 585 (1940). It is not unreasonable to presume that when the Cochran Respondents - all eminent New York attorneys - helped Louima draft his January 23, 1998 letter, they knew, or should have known, that a New York attorney who withdraws without cause from a client's matter is not entitled to any fee.

Furthermore, when the attorney/client relationship between T&F and Louima ceased in January 1998, the Daily News reported that Peter Neufeld, one of Louima's new lawyers, told the newspaper that the departing attorneys were "discharged". A1252-1253, Plaintiff's Exhibit 17. The record demonstrates that, neither at the time of the Daily News publication, nor at any other subsequent time, including the fee dispute hearing four years later, did Mr. Neufeld deny this statement which the Daily News attributed to him.

Both the District Court and the Circuit Court ignored these salient facts. Otherwise, the Circuit Court would have reached the only conclusion which the hearing record permits namely, that T&F and the Petitioner were constructively discharged on January 23, 1998.

CONCLUSION

For all of the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 11, 2006

Excerpts of the Report and Recommendation of Magistrate Judge Cheryl L. Pollack, Dated July 21, 2004

Appendix A

INTRODUCTION

On August 6, 1998, plaintiffs Abner and Micheline Louima filed this civil action against the City of New York, the Patrolman's Benevolent Association ("PBA"), various individually named officers of the New York City Police Department ("NYPD"), and members of the PBA, alleging, inter alia, violations of 42 U.S.C. § 1983 in connection with the brutal attack on Abner Louima that occurred on August 9, 1997 and the subsequent alleged cover-up conspiracy by the defendants. The underlying action was settled on July 14, 2001, with the Louimas receiving a total amount of $8.75 million in exchange for dismissal of the claims against all of the defendants except for Officers Charles Schwarz and Francisco Rosario. Pursuant to the settlement agreement, one-third of the total settlement amount, representing the amount to be allocated as attorneys' fees, was deposited in an escrow account to be administered by a trustee appointed by the Court.

On March 12, 2001, prior to the consummation of the settlement, the current attorneys for plaintiffs, the firm of Cochran, Neufeld & Scheck ("CN&S"), and the firm of Rubenstein and Rynecki (the "Rubenstein firm"), filed a motion to invalidate any claims made by the Louimas' prior counsel, Carl W. Thomas, Esq.[1] Brian Figeroux, Esq., the firm

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[1] As a consequence of the untimely and unfortunate death of Mr. Thomas in August 2001, his interest in this matter is being pursued by his Estate. (Supplemental Memorandum of Law in Opposition to Plaintiffs' Application for Fee Forfeiture and for Recovery of Fees Due ("Estate Mem.") at 1). Prior to the hearing, an issue arose as to the extent to which conversations with Mr. Thomas could be related by other witnesses in light of the restrictions of the Dead Man's Statute. That was the subject of a separate Order of this Court dated November 14, 2002, and will not be addressed herein.

of Thomas & Figeroux ("T&F"),[2] and Casilda E. Roper-Simpson, Esq., to share in the legal fees arising from the

However, if the district court disagrees with this Court's finding that T&F withdrew from further representation of the Louimas, or that such withdrawal was without good cause, then, as set forth below, T&F would be entitled to an award of fees. In order to assist the district court in its analysis, this Court will set forth, in the alternative, the basis for and amount of such an award.

D. Misconduct by T&F

In addition to arguing that T&F are not entitled to share in the legal fees due to their withdrawal without cause, CN&S also contend that T&F forfeited any right to fees because they violated the rule of client confidentiality as set forth in D.R. 4-101, by disseminating client confidences and secrets both before and after they ceased their representation of the Louimas. (CN&S Post-Tr. Br. at 113-114).

(1) Standing

In response, T&F and Roper-Simpson contend first that CN&S have no standing to raise the issue of T&F's alleged breach of the Disciplinary Rules. Citing the Restatement (Third) Law Governing Lawyers § 6, T&F argue that "[t]actical deployment of the disciplinary rules ... is highly disfavored," and the fact that a disciplinary rule may provide a basis for sanctions against an attorney "'does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.'" (T&F Mem. at 53

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[2] At the time the Louima family first contacted Messrs. Thomas and Figeroux, the firm of T&F did not exist. The two lawyers subsequently joined as a firm and remained as such until the

(quoting Restatement (Third) Law Governing Lawyers § 6)). Therefore, T&F contend that CN&S have no standing to seek a reduction in fees based on purported breaches of the ethical duties owed by T&F to Louima.

(T&F Post-Tr. Br. at 55).

None of the parties have identified any case law directly on point dealing with a fee dispute between attorneys who are signatories to a fee-splitting contingency fee agreement where one attorney is accused of ethical violations. The cases cited by T&F for the proposition that only the client has a right to assert a claim based on an alleged violation of the disciplinary rules are inapposite. See, e.g., Itar-Tass Russian News Agency v. Russian Kurier, Inc., 1999 WL 58680, at *9 (holding that co-plaintiffs who are not liable for attorneys' fees could not move for sanctions against plaintiff's counsel for a violation of the Disciplinary Rule governing fee splitting since co-plaintiff had not been damaged by the fee splitting arrangement); Heard v. Bonneville Billing & Collections, 216 F.3d 1087 (table) (10th Cir. 2000) (holding that plaintiff lacked standing to challenge a fee splitting arrangement between defendant and defendant's counsel); Pepe & Hazard v. Jones, 33 Conn. L. Rptr. 72, 77 (Conn. Super. Ct. 2002) (excluding testimony of legal ethics expert in dispute between former law partners).

None of these cases deal with a dispute such as the one here, where the Louimas executed a retainer agreement dated November 3, 1997 with all of the attorneys,[94] providing that the various attorneys would be entitled to share a one-third legal fee resulting from the joint efforts of all the attorneys. (Ex. 2). In this agreement, the clients agreed to joint representation by the attorneys, and agreed to a contingency fee of one-third to be

[94] Roper-Simpson was not a party to this agreement.

divided equally between the firms of CN&S, Rubenstein & Rynecki, and T&F. (Id.)

Under the Disciplinary Rules, the division of the one-third fee portion is expressly left to the attorneys to decide. SeeD.R. 2-107(A)(l), N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.12

(requiring only that the client be informed and "consent[ ] to the employment of the other lawyer after a full disclosure that a division of fees will be made"); see also Carter v. Katz. Shandell. Katz & Erasmous. 120 Misc.2d 1009, 1018, 605 N.Y.S.2d 991, 997 (N.Y. Sup. Ct. 1983) (holding that "[a] client is simply to be made aware that another attorney is ... representing her.. .. Any further elaboration or specificity regarding the exact arrangement between the collaborating attorneys is not ethically mandated by [D.R. 2-107]").

Clearly, the Louimas could easily file an application with this Court seeking to have T&F's share of the fees forfeited based on the very same breaches of the Disciplinary Rules that were examined in this fee proceeding. In this case, CN&S and the Rubenstein firm essentially stand in the shoes of the Louimas in asserting that T&F's violations of their ethical obligations to their clients were sufficiently egregious to warrant forfeiture of T&F's right to a share of the fees. To hold otherwise would mean that an attorney who agrees to split a contingency fee with another attorney could blatantly commit untold breaches of the ethical rules to the detriment of the client or withdraw without cause and rest on his laurels while the remaining attorney labors successfully on behalf of the client. If the remaining attorney had no standing to raise these issues of breach in the context of a fee sharing agreement, he would have no recourse to object when the breaching attorney demanded his equal share of the fee. While T&F is correct that, in the absence of the fee splitting agreement among counsel, any fees forfeited by T&F would be returned to the client, here T&F's violations do not vitiate the agreement that

the Louimas have with their other counsel. Collectively, the attorneys are still entitled to receive one-third of the total settlement, and any portion of the fees forfeited by T&F would still be considered to be part of the fee amount to be divided among the remaining counsel. Thus, based on the equities, and the absence of any authority to the contrary, this Court concludes that CN&S have standing to raise alleged ethical breaches by T&F that would otherwise be asserted by the Louimas in the absence of the fee-sharing agreement. (See, e.g. Ex. 2; see also Ex. 60).

(2) Confidences and Secrets

It is well established that "the role of a lawyer vis a vis the interests of his client is categorized as that of fiduciary trustee." Condren v. Grace. 783 F. Supp. 178, 182 (S.D.N.Y. 1992) (citing Cinema 5 Ltd, v. Cinerama. Inc.. 528 F.2d 1384, 1386 (2d Cir. 1976)). See also Hafter v. Farkas. 498 F.2d 587, 589 (2d Cir. 1974). This relationship of trust requires an attorney "to exercise the highest degree of good faith, honesty, integrity, fairness and fidelity," Condren v. Grace. 783 F. Supp. at 182, and "precludes the attorney from having personal interests antagonistic to those of his client," Id.

D.R. 4-101(B) provides that a lawyer shall not reveal a "confidence" or "secret" of a client, or use a confidence or secret of his client to the disadvantage of the client or to provide an. advantage t himself, except under certain limited circumstances. D.R. 4-101(B), N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.19. D.R. 4-101(A) defines "'[c]onfidence' [as] information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client."

D.R. 4-101(A), N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.19. As one court noted: "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not

statements did not cause Louima to terminate T&F earlier. However, because the Court considers T&F's breaches to be extremely serious, this Court respectfully recommends that T&F forfeit a significant portion of their fees due to their unjustified disclosure of their client's secrets.

E. Roper-Simpson's Claim to Fees

Before calculating the amount of fees to which T&F would have been entitled if they had withdrawn with good cause, this Court must first address Ms. Roper-Simpson's claim for fees in this action.

Despite her attorney's protestation to the contrary (see R.S. Tr. III at 76), Ms. Roper-Simpson's position regarding the basis for her right to compensation has changed during the course of the fee dispute. Initially, prior to the commencement of the fee hearing, she conceded that she was not hired by the Louimas, but that she was retained to assist T&F. (See R.S. Mem. At 11 (stating "Ms. Roper-Simpson had no agreement with the Louimas, oral or written")). In her Affidavit filed prior to the fee hearing, she represented that while she was "self-employed" and had "never been an employee" of either Thomas, Figeroux or the T&F firm,[102] "[s]ometime in August 1997, Carl W. Thomas, Brian Figeroux and myself had agreed orally that fees from all the cases which were jointly handled by us would be shared equally among us." (Affidavit of Casilda Roper-Simpson, dated mar. 29, 2001 ("R.S. Aff.") ¶¶

[102] She testified during the fee proceeding that she was never an associate in the firm of T&F, nor a partner either. (R.S. Tr. III at 130)

8-10).

However, during the course of her testimony at the hearing, she was questioned about certain notes in her personal diary which reflected the following: "TC [Carl Thomas] states that [he] think[s] FB [Brian Figeroux] thinks & concern that I [Roper-Simpson] want proportionate.

That's why he's keeping me out of meeting s]." (Ex. 84-O; R.S. Tr. III at 72). She explained that what she was referring to here was a discussion about the arrangement to split fees in the Louima matter three ways with T&F. (R.S. Tr. III at 72). Her notes further indicate that when she pressed for a contract in writing, Figeroux "stated [n]o writing. Attys keep changing, percentage keep changing]." (Ex. 84-O). On the other hand, she testified that Thomas thought she should receive a third. (R.S. Tr. III at 87). When asked at the hearing, whether she had an agreement with the T&F lawyers that there would be a one-third split of any fees received from the Louima matter, she conceded that at the time she wrote these notes, there was no agreement. (R.S. Tr. III at 78 -79). She stated: "Well, there was really never an understanding. That's why we were in the process of negotiating, myself and Brian and Carl." (Id. at 79). However, by late September of 1997, Roper-Simpson believed she had "an oral agreement" of a one-third split among her, Thomas and Figeroux. (Id. at 128, 130,152-53). She also conceded that nowhere in her notes had she indicated that she believed Louima would have to pay her. (Id. at 79).

However, in the course of her testimony during the fee proceedings, Roper-Simpson seemed to suggest that she had an oral agreement directly with the Louimas. When questioned about the statements in her Affidavit, she confirmed that she never had a written agreement with Louima, but her testimony was unclear as to whether she

was asserting a claim that she had an oral agreement with him. When asked by counsel for CN&S whether it was true that "neither Abner nor Micheline Louima ever orally retained you," Roper-Simpson responded: "I can't positively respond to that in terms of yes or no." (R.S. Tr. III at 178). She testified that there was a conversation in January of 1998, in which Louima allegedly said to her and to Thomas and Figeroux that he wanted them to continue to work on the case, and that she believed Louima was referring to her as well since she was in the room at the time. (Id. at 180). When confronted with the statement in her attorney's Memorandum of Law that she was not asserting that she had an oral or written agreement with the Louimas, Roper-Simpson agreed that the statement that she had no written agreement with Louima was correct, but testified that "[i]n reference to the oral part I again say, no. And in any event, I did not read all of this by my attorney." (Id. at 181).

Subsequently, during the course of her testimony, Roper-Simpson's counsel made it clear, that she was seeking fees under two theories: one theory was that she should receive a one-third portion of any amount that is awarded to T&F, and under a separate theory, she argues that she has an independent claim that entitles her to receive fees directly from Louima calculated on a quantum meruit basis. (R.S. Tr. III at 73-76). This second theory, although not spelled out in any detail, seems to appear in Roper-Simpson's legal memorandum submitted prior to the hearing. This memorandum contained the following assertion:

> In the event that the court declines to enforce the Retainer Agreement of November 3, 1997, Ms. Roper-Simpson should be paid from the settlement proceeds...on the theory of quantum meruit. Ms. Roper-Simpson had no agreement with the Louimas, oral or written. However, she rendered her professional services to the Louimas for their benefit.

(R.S.Mem. at 11).

In her post-hearing papers, Roper-Simpson seems to have abandoned any claim that she is seeking fees directly from Louima. However, to the extent that Roper-Simpson may still be claiming that she is entitled to fees directly from Louima as the result of some sort of oral agreement, this Court does not find her testimony to be credible in that regard. First, her representation that she had an agreement with Louima conflicts with her March 2001 Affidavit, and directly contradicts statements in her attorney's memorandum of law. Moreover, she conceded an awareness of the rules of the Second Department which require attorneys in a contingency fee case to file a retainer statement with the Office of Court Administration, and admitted that she had done so here. (R.S. Tr. II at 188-194; N.Y. Comp. Codes R. & Regs., tit 22, § 691.20).[103] Based on the totality of credible evidence, the Court concludes that Ms. Roper-Simpson has no direct claim for fees as the result of an agreement with the Louimas.

Her Post-Hearing Memorandum of Law states: "[i]t is also no longer in dispute that Roper-Simpson has an enforceable fee-sharing agreement with the firm of Thomas & Figeroux." (R.S. Post-Tr. Br. at 9). What she claims now is that:

> She was working pursuant to an oral understanding with Thomas & Figeroux to share fees due to Thomas & Figeroux by virtue of Plaintiffs' Exhibit 2 [the Retainer Agreement].
>
> By virtue of her oral agreement with [T&F] to an equal share of fees in this case, Roper-Simpson has a beneficial interest in Exhibit 2.

(Id. at 28).

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[103] In addition, D.R. 2-106(d) requires all contingent fee agreements to be documented in a writing provided to the client. D.R. 2-106(d), 22 N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.11.

To the extent that she claims entitlement of fees based upon a theory of quantum meruit, Roper-Simpson cites on cases in support of her claim that she is entitled to a share based on a theory that she is a third-party beneficiary to the Retainer Agreement executed by the Louimas and dated November 3, 1997. (R.S. Post-Tr. Br. at 28; Ex. 2).[104] Indeed, it is clear that, given this Court's finding that there was no direct retainer agreement entered into between the Louimas and Roper-Simpson, she cannot recover any portion of the fees, unless she demonstrates that she had an agreement with T&F, in which case her share would come out of the share allocated to T&F.[105] See, e.g., Warren v. Meyers, 187 Misc.2d 668, 673, 723 N.Y.S.2d 337, 342 (N.Y. Sup. Ct. 2001) (finding that firm that performed work on behalf of client with client's knowledge but without valid retainer agreement could not assert direct claim upon client for fee but was entitled to a share of the fee awarded to the referring attorney). Although Roper-Simpson may be entitled to an "equitable lien" on T&F's share of the fees based on an agreement with T&F, made with the client's authority (see discussion supra at 101-105), Roper-Simpson must first establish that she had such an agreement with T&F and that Louima was aware of it and approved of it.

However, it is unclear to this Court on what basis Roper-Simpson is claiming that she had a firm agreement with T&F. While Roper-Simpson asserts that she had an oral agreement to split fees with T&F, her own testimony in this regard is conflicted, and the notes taken contemporaneously

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[104] This Retainer Agreement lists Rubenstein & Rynecki, Thomas & Figeroux, and Johnnie Cochran, Barry Scheck and Peter Neufeld. (Ex. 2). Roper-Simpson's name does not appear anywhere in the document. (Id.)

[105] Her actions and those of T&F in reaching a fee-splitting agreement also arguably violate the Disciplinary Rules. D.R. 2-107 prohibits the division of fees for legal services with an attorney who is not a partner or associate in the lawyer's firm except with the client's consent. D.R. 2-107, N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.12.

with discussions that she had with T&F on this topic suggest otherwise. In addition, Figeroux's testimony does not confirm that any such solid agreement regarding Roper-Simpson's compensation was reached. At the hearing, Figeroux testified that Thomas brought Roper-Simpson in to work on the case (F. Tr. EH at 37), and he also testified that, in his opinion, "she was an employee of Carl W. Thomas. (Id at 64).[106]

Based on Roper-Simpson's and Figeroux's description of the relationship between Roper-Simpson and T&F, it is likely that any fee arrangement would have been discussed primarily between Roper-Simpson and Thomas, who, of course, was deceased at the time of these proceedings. However, while the precise contours of Roper-Simpson's arrangement with T&F are not clear, and in fact may never have been agreed upon, it is also clear that neither Roper-Simpson, Thomas, nor Figeroux thought that Roper-Simpson was working for free. (See R.S. Post-Tr. Br. at 28). In addition, Louima's repeated contacts with Roper-Simpson demonstrate that he was aware of her efforts and did not object to her collaboration with T&F. In fact, Louima acknowledged that he understood that Roper-Simpson was working with T&F, and that she would be paid by them. (L. Tr. at 14-15; see also Ex. 8).

Therefore, to the extent that T&F are entitled to receive fees in this matter, Roper-Simpson is entitled to a share of those fees. At this point, however, given this Court's recommendation that T&F receive no portion of the attorneys' fees, this Court respectfully recommends that Roper-Simpson also receive no fees. In the event that it is determined that T&F should receive a percentage of the fee award, this Court

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[106] He also testified that the firm of T&F was actually created on the same day Figeroux came back from his first visit with Louima in the hospital and met with Thomas. (F. Tr. ffl at 64). From the chronology of events, it appears that Roper-Simpson became involved shortly thereafter.

respectfully recommends that Roper-Simpson receive a portion of those fees awarded to T&F based on her contribution to the Louimas' representation.

F. Fee Determination

In determining an appropriate fee in a case where there has no misconduct by counsel, the New York Court of Appeals has held that "a discharged attorney may recover the 'fair and

the part of CN&S or Rubenstein that would warrant forfeiture of their fees.

CONCLUSION

In summary, this Court respectfully recommends that CN&S' motion for an order forfeiting T&F's share in the fees due to their unjustified withdrawal from the case be granted. In the event the district court disagrees, it is respectfully recommended that there be a significant reduction in T&F's fees based on T&F's unwarranted disclosures of client secrets to the press. This Court further recommends that, if they are to receive any fees, T&F's fees be limited to $212,222.50, of which $35,000 be distributed to Roper-Simpson, and that Figeroux be denied any right to share in those fees based on his conduct in connection with this dispute.

Finally, this Court respectfully recommends that T&F's motion to have CN&S forfeit their fees be denied.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within ten (10) days of receipt of this Report. Failure to file objections within the specified time waives the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(l); Fed. R. Civ. P. 6(a), 6(e), 72(b); Small v. Secretary of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

The Clerk is directed to mail copies of this Report and Recommendation to the parties.

SO ORDERED.

Dated: Brooklyn, New York
July 21, 2004

s/
CHERYL L. POLLAK
United States Magistrate Judge

Memorandum and Order of the United States District Court for the Eastern District of New York Dated September 28, 2004

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ABNER LOUIMA, et. al.,
Plaintiffs,

98 CV 5083 (SJ)
MEMORANDUM
AND ORDER

-against-

THE CITY OF NEW YORK, et al.,
Defendants.

----------X

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JOHNSON, Senior District Judge:

Presently before this Court is the Estate of Carl Thomas ("Thomas" or the "Estate")[1] , Thomas & Figeroux ("T&F"), and Casilda Roper Simpson ("Roper-Simpson") objections to Magistrate Judge Cheryl L. Pollack's ("Magistrate Judge Pollack") Report and Recommendations dated July 21, 2004. Brian Figeroux ("Figeroux") filed no objections to the Report and Recommendation. For the reasons set forth below, the Court adopts Magistrate Judge Pollack's Report and Recommendation in part.

FACTUAL BACKGROUND

The Court will provide a brief outline of the facts. Magistrate Judge Pollack extensively and impressively outlines the factual background and procedural history of the case and the fee dispute before this Court. (See Report and Recommendation ["Report"], dated April 24, 2003, at 1-98.)

On August 9, 1997, Plaintiff Abner Louima ("Louima") was brutally assaulted by one or more police officers after he left a nightclub in Brooklyn, New York. (Id. at 7.) Outside of the nightclub, police officers handcuffed Louima and transported him to the 70th Precinct. (Id,) The officers beat Louima on the way to the precinct, and once there, an officer took Louima into a bathroom and shoved a stick into his rectum. (Id.) The details of Louima's assault were widely covered in the New York press and nationally. Immediately following his assault and while criminal charges were pending against him, Louima orally retained the legal services of T&F for purposes of bom his then pending criminal charges and any potential civil-action, -(Id. at 7-10.) T&F brought Roper-Simpson into the case. Louima did not retain Roper-Simpson, but rather was told that Roper-Simpson would be "working with [T&F]," and that he

[1] In August 2001, Thomas died. His interest in this matter is being pursued by his Estate.

understood that "she would be paid by T&F." (14 at 9.)

On August 15, 1997, Louima retained Sanford Rubenstein ("Rubenstein") of Rubenstein and Rynecki (the "Rubenstein firm") to represent him in the civil matter. (Id. at 19.) Lastly, on August 25, 1997, Louima retained the firm of Cochran Neufeld & Scheck ("CN&S") "to investigate and pursue a claim for personal injury and civil rights violations and to represent him in connection with the state and federal criminal and civil rights investigations relating to this incident." (Id at 25, 27.) On October 6, 1997, T&F, the Rubenstein firm, and CN&S entered into an "Agreement By and Between counsel," stating that the total attorneys' fees shall not exceed 33 1/3 percent of the net recovery and that the fees will be divided amongst counsel. (Id at 27.) On November 3, 1997, Louima executed another Retainer Agreement, specifying that the total amount of legal fees, representing 33 1/3 percent of any total net recovery, would be divided equally, with T&F, the Rubenstein firm, and CN&S each receiving "eleven (11) and one-ninth (1/9) percent." (Id at 28.)

Although heatedly contested, on January 23, 1998, T&F and Roper-Simpson withdrew from further representation of Louima. (Id. at 113-21.) Following T&F's withdrawal from the case, the Rubenstein firm and CN&S entered into an "Amendment to [the] Agreement By and Between Counsel," in which they agreed that (a) the Rubenstein firm would receive eleven (11) percent of any portion of the eleven (11) percent of the gross recovery to which Thomas & Figeroux are not entitled to; and (b) CN&S would receive 89% of the 11% of the gross recovery to which Thomas & Figeroux are not entitled to." (Id. at 28-9.)

On August 8, 1998, Plaintiffs Abner and Micheline Louima (the "Louimas") filed this civil action alleging violations of 42 U.S.C. -§ 1983 in connection with the brutal

attack. On March 21, 2001, the Rubenstein firm and CN&S filed the instant motion to prevent Thomas, Figeroux, the firm of T&F, and Roper-Simpson from receiving attorneys' fees in connection with the litigation. (Id. at 4.) On July 14, 2001, the case settled, resulting in an award of $8.75 million to the Louimas. (Id.) This Court referred the fee dispute to Magistrate Judge Pollack. After voluminous briefing and numerous hearings, Magistrate Judge Pollack recommended that: (1) T&F be denied any share of the attorneys' fees in the litigation because they voluntarily withdrew from further representation of the Louimas without good cause, or, (2) in the alternative, if T&F are to receive attorneys' fees, their amount should be reduced due to the disclosure of client confidences and secrets in violation of disciplinary rules. The Estate, T&F, and Roper-Simspon filed objections to Magistrate Judge Pollack's Report and Recommendations. Figeroux did not file objections.

STANDARD OF REVIEW

A district court judge may designate a magistrate to hear and determine certain motions pending before the court and to submit to the court proposed findings of fact and a recommendation as to the disposition of the motion. See 28 U.S.C. § 636(b)(l). Within ten (10) days of service of the recommendation, any party may file written objections to the magistrate's report. Id. Upon *de novo* review of those portions of the record to which objections were made, the district court judge may affirm or reject the recommendations. Id.
The court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendation to which no objections are addressed. See Thomas v. Arn. 474 U.S. 140, 150 (1985). In addition, failure to file timely objections may waive the right to appeal this Court's Order. See 28 U.S.C. § 636(b)(l); Small v.

Sect'v of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

DISCUSSION

The Rubenstein firm and CN&S contend that T&F should not receive any portion of the legal fees in this matter because they withdrew from representing the Louimas without cause and violated their ethical duty to keep client confidences and secrets confidential. The Court will consider these issues in turn.

I. Did T&F and Roper-Simspon withdraw from the case without cause?

Magistrate Judge Pollack recommended that T&F be denied attorneys' fees because they withdrew from the litigation without cause. (Id. at 113-27.) Crediting the testimony of Louima, Magistrate Judge Pollack found that T&F voluntarily withdrew from the case after Louima gave them one last chance to follow his instructions to cease speaking to the press without first obtaining his authorization. (Id. at 113-14.)

Magistrate Judge Pollack rejected T&F's and Roper-Simpson's contentions that they were fired and their alternative argument that they were forced off the case by CN&S' efforts to alienate them from Louima. (Id. at 113-21.) Magistrate Judge Pollack found that there was no credible evidence showing a concerted effort by CN&S to alienate Louima from T&F. (Id. at 118.) Although Magistrate Judge Pollack acknowledged a break-down in T&F's and CN&S' working relationship, she found that their poor relationship was attributed in large part by T&F's behavior. (Id. at 120.) Thus, Magistrate Judge Pollack refused to allow the state of T&F's poor relationship with CN&S to justify their departure, (Id at 120-21.)

Although the Court agrees with Magistrate Judge Pollack that T&F and Roper-Simpson withdrew from the case without cause, in the interest of equity, the Court finds that the Estate of Thomas and Roper-Simpson are entitled to fees based on work performed in the early stages in the litigation.

II. Did T&F forfeit their right to attorneys' fees?

In the event that T&F and Roper-Simpson were found not to have withdrawn from the case, or that such withdrawal was not without good cause, Magistrate Judge Pollack found that T&F is entitled to attorneys' fees. Magistrate Judge Pollack rejected CN&S' argument that T&F forfeited any right to attorneys' fees because they violated the rule of client confidentiality as set forth in D.R. 4-101 by disseminating client confidences and secrets both before and after they ceased their representation of Louima.[2] (Id. at 139.) Magistrate Judge Pollack rejected claims that CN&S and the Rubenstein firm lacked standing to challenge T&F's right to attorneys' fees based on ethical violations. (Id. at 123.)

However, finding that T&F did in fact disclose client secrets to the press, Magistrate Judge Pollack recommended that T&F forfeit a significant portion of their fees under the fee sharing agreement. Magistrate Judge Pollack found that Roper-Simpson's award of attorneys' fees should not be reduced because there "has been no evidence of any ethical violations by Ms. Roper-Simpson, who appears to have acted in Louima's interest at all times and did not have any discussions with the press that were not authorized." (Id. at 139 n. 101.) Magistrate

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[2] D.R. 4-101(b) provide that a lawyer shall not reveal a "confidence" or 'secret" of a client, or use a confidence or secret of his client to the disadvantage of the client or to provide an advantage to himself, except under certain limited circumstances. D.R. 4-101(B), N.Y. Comp. Codes R. & Regs., tit. 22 1200.19.

Judge Pollack noted that any award given to T&F is in "recognition of the fact that T&F did perform a valuable service to Louima in the early weeks following the incident." (Id. at)

In determining the reasonable value of T&F's and Roper-Simpson's services, the Court considered the standing of the lawyers at the bar, T&F's contributions to the case, and the work performed by CN&S and Rubenstein. Magistrate Judge Pollack noted that CN&S collectively had more experience with complex litigation in general and civil rights cases in particular than Thomas, Figeroux, and Roper-Simpson, and that CN&S did the lion's share of the work leading to the settlement of the litigation. Magistrate Judge Pollack rejected T&F's and Roper-Simpson's claims that they expended many hundreds of hours on behalf of Louima. Magistrate Judge Pollack noted that they failed to submit time records for work allegedly performed on the case. After considering the duties performed and time expended on the case, Magistrate Judge Pollack found that T&F radically overstated the value of .their contribution to the case.

After comparing the amount and nature of the work performed by T&F and Roper-Simpson with that of the other lawyers, Magistrate Judge Pollack concluded that "[i]n absence of any fee sharing agreement, and had they committed no breaches of their ethical violations, T&F and Roper-Simpson's contributions to the Louimas' case would I amount to at most 10 percent of the time and services rendered in the case, or $303, 175.01." Magistrate Judge Pollack then applied a 30 percent reduction for ethical violations committed by T&F, which resulted in a total fee of $212,222.50.

In determining whether the $212,222.50 figure was an appropriate portion of the fees for T&F and Roper-Simpson, Magistrate Judge Pollack next estimated T&F's fees using the lodestar method. After applying the lodestar method, Magistrate Judge Pollack found that Thomas and Figeroux each were entitled to $78,400.00, and Roper-Simpson is

entitled to $35,000. Magistrate Judge Pollack concluded that Figeroux was not entitled to any fees because he filed an affidavit with the Court that contained at least one false statement and perjured himself while testifying during the fee proceeding. Magistrate Judge Pollack recommended that his share revert to the firm of T&F, or in this case, the Estate.[3]

In their objections, the Estate, T&F, and Roper-Simpson contend that Magistrate Judge Pollack wrongly found that the Rubenstein firm and CN&S had standing to challenge T&F's right to attorneys' fees based on purported ethical violations. The parties further contend that Magistrate Judge Pollack wrongly calculated the amount of attorneys' fees awarded.

The Estate and T&F request that T&F be awarded at least ten percent of the fees, or $303,175.01. Roper-Simpson requests to share equally in the fees of T&F. Roper-Simpson requests one-third (1/3) of the fees due to T&F, and if Figeroux is not entitled to any fee award, she wants one-half of his portion, with the other half going to the Estate of Carl Thomas. Roper-Simpson contends that she was not an employee of T&F, but rather there existed a joint venture between her and T&F to work on the Louima case.

Roper-Simpson also objects to the manner in which Magistrate Judge Pollack calculated the award of fees. Roper-Simpson asserts that a more reliable indicium of how to calculate the fees of the attorneys in the case is the significance of their contributions. Roper-Simpson contends that the most

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[3] Magistrate Judge Pollack found "Figeroux's conduct in connection will this fee proceeding to be so beyond the bounds of ethical conduct that it warrants a referral to the Disciplinary Committee of the Bar and a recommendation that he be barred from further practice in this Court." (Id. at 170 n. 119.) Magistrate Judge Pollack declined to make that recommendation "without first affording Figeroux an opportunity to respond and provide a justification or explanation for his conduct." (Id.) This issue is not before the Court at this time

significant events in the case, to wit, early press coverage and the early involvement of the U.S. Attorney's Office, were events in which she was involved.

The Court rejects the Estate's, T&F's, and Roper-Simpson's contention that the Rubenstein firm and CN&S lack standing to challenge their award of fees based on purported ethical violations. The Court agrees with Magistrate Judge Pollack that "CN&S and the Rubenstein firm stand in the shoes of the Louimas in asserting that T&F's violations of their ethical obligations to their clients were sufficiently egregious to warrant forfeiture of T&F's right to a share of the fees." (Id. at 123.) Although there is no case directly on point, the Court further agrees with Magistrate Judge Pollack that "[t]o hold otherwise would mean that an attorney who agrees to split a contingency fee with another attorney could blatantly commit untold breaches of the ethical rules to the detriment of the client or withdraw without cause and rest on his laurels while the remaining attorney labors successfully on behalf of the client." (Id.) After carefully considering the Estate's, T&F's, and Roper-Simpson's objections, the Court adopts Magistrate Judge Pollack's calculation of attorneys' fees, in which the Estate was awarded $156,800, and Roper-Simpson was awarded $35,000.[4]

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[4] The Court also agrees with magistrate Judge Pollack's finding that no forfeiture of the Rubenstein firm's and CN&S' attorneys' fees were warranted.

CONCLUSION

After considering the parties' arguments, this Court adopts and affirms Magistrate Judge Pollack's report and recommendation in part.

Dated: September 28, 2004
Brooklyn, New York

s/
Senior U.S.D.J.

SO ORDERED.

Summary Order of the United States Court of Appeals for the Second Circuit, Dated January 20, 2006, and Issued as a Mandate on April 4, 2006

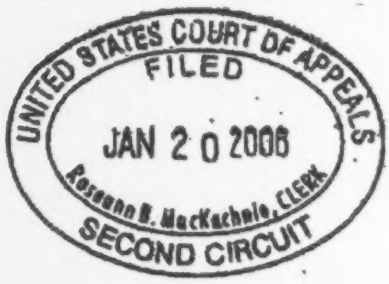
Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York on the 20th day of January, two thousand six.



PRESENT: HON. DENNIS JACOBS,
HON. PIERRE N. LEVAL,
HON. CHESTER J. STRAUB,
Circuit Judges.

———————————————————————————X

CASILDA E. ROPER- SIMPSON,

Interested-Party-Appellant,

04-5533-cv

-v.-

BARRY C. SCHECK, JOHNIE L. COCHRAN and SANFORD RUBENSTEIN,

Appellees,

ABNER LOUIMA and MICHELINE LOUIMA,

Plaintiffs,

CITY OF NEW YORK, NEW YORK POLICE DEPT, PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, individually and in their official capacity as New York City Police Officers, JUSTIN VOLPE, CHARLES SCHWARZ, MICHAEL BELLOMO, JEFFREY FALLON, FRANCISCO ROSARIO, ROLANDO ALEMAN, WILLIAM F. WALSH, JEREMIAH QUINLAN, individually, in his official capacity as a New York City Police Officer, and as a PDA Delegate, LOUIS MATARAZZO, individually and in their official capacity, WILLIAM PAGAN, FRANK BIRNBAUM, individually, and in their official capacity as New York City Police Officers, and in their official capacity as agents of the PBA,MICHAEL IMMITT, MARCELLA MAKEBISH, PATRICK O'SULLIVAN, individually and in their official capacity, JOHN DOES, police officers and non-uniformed employees of the New York Police Department, the identity and number of whom is presently unknown; individually and in their official capacity as New York City Police Officers, RICHARD ROES, supervisory police officers

of the City of New York, the identity and number of whom is presently unknown; and individually and in their official capacity as police officers and/or agents for the PBA, WILLIAM WOES, agent for the PBA, the identity and number of whom is presently unknown, and TIMOTHY LEE, in their official capacities as President of the PBA,

Defendants-Cross-Defendants.

PETER BLAICH, individually, in his official capacity as a New York City Officer and as a PBD Delegate, JOSEPH O'BRIEN, individually, in their official capacity as New York City Police Officers, and as PBA Delegates, JEREMIAH DALY, individually, in their official capacities as New York City Officers, and as PBA Delegates, PATRICK LYNCH, individually, and in their official capacity as agents of the PBA, ANTHONY ABBATE, individually and in their official capacity as employees of the Emergency Medical Service for the City of New York, THOMAS WEISE, in his official capacity as President of the PBA and Thomas Bruder,

Defendants-Cross-Claimants-Cross-Defendants.

----------X

APPEARING FOR INTERESTED-PARTY -APPELLANT:

K.C. OKOLI, New York, New York

APPEARING FOR APPELLEES THE ESTATE CARL W. THOMAS AND THOMAS & FIGEROUX:

BRADLEY D. SIMON, Simon & Partners LLP,
New York, New York

APPEARING FOR APPELLEES BARRY C. SCHECK, JOHNNIE L. COCHRAN, PETER NEUFELD AND SANFORD RUBENSTEIN:

MICHAEL ROSS, Law Offices of Michael S. Ross, New York, New York

Appeal from the Order of the United States District Court for the Eastern District of New York (Johnson, J.) dated September 28, 2004, resolving fee dispute among counsel.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Order of the district court be AFFIRMED.

Caisilda E. Roper-Simpson ("Roper-Simpson") appeals from the September 28, 2004 Memorandum and Order of theUnited States District Court for the Eastern District of New York (Johnson, J.) finally determining the fee disputes among lawyers who provided legal services to Abner Louima: Roper-Simpson; Brian Figeroux and Carl W. Thomas ("Thomas & Figeroux"); Johnnie L. Cochran, Peter Neufeld, and Barry C. Scheck ("CN&S"); and Sanford Rubenstein ("Rubentstein"). Familiarity is assumed as to the facts, the procedural context, and the issues specified for appellate review.

As to the parties' standing challenges: all of the parties stand to lose or gain financially from the division of fees. Roper-Simpson, and CN&S and Rubenstein therefore have standing to bring the fee dispute and to press this appeal.

Turning to the merits of Roper-Simpson's appeal, "[w]e review a district court's decision as to whether to award attorney's fees for abuse of discretion." Herman v. Davis Acoustical Corp., 196 F.3d 354, 356 (2d Cir. 1999)

see also Universal Acupuncture Pain Servs., P.C. v. Ouadrino & Schwartz, P.C., 370 F.3d 259, 262 (2d Cir.2004). Magistrate Judge Pollak heard days of testimony regarding the work performed by Roper-Simpson and Thomas & Figeroux. The different metrics upon which this work could be valued were carefully considered. We find no abuse of discretion in the district court's estimate of hours of work performed by the attorneys or in the calculation of fees based on the lodestar method.

We likewise find no abuse of discretion in the district court's denial of an equal division of fees as between Roper-Simpson and Thomas & Figeroux, notwithstanding a fee-sharing agreement between the two parties. Magistrate Judge Pollak found that the precise terms of the agreement are unclear. Moreover, the agreement itself is unenforceable under New York law because it was made without informing the client. SeeNaiman v. N.Y. Univ. Hosps. Ctr., 351 F. Supp. 2d 257, 263 (S.D.N.Y. 2005); Code Prof. Resp. D.R. 2-106(D), N.Y.Comp. Codes R. & Regs. tit. 22, § 1200.11(d). The district court did not abuse its discretion in declining to follow the agreement and instead awarding fees in quantum meruit based on work actually performed.

For the reasons set forth above, the Order of the district court is AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:

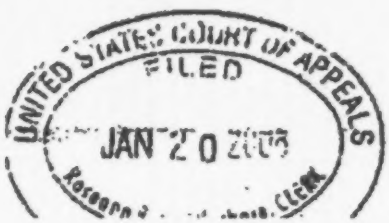
_____s/_____
Lucille Carr, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 20th day of January, two thousand six.



PRESENT: HON. DENNIS JACOBS,
HON. PIERRE N. LEVAL,
HON. CHESTER J. STRAUB,
Circuit Judges.

———————————————————————X

CASILDA E. ROPER-SIMPSON,

Interested-Party-Appellant,

-v.-

04-5533-cv

BARRY C. SCHECK, JONNIE L. COCHRAN and SANFORD RUBENSTEIN,

Appellees,

ABNER LOUIMA and MICHELINE LOUIMA,

Plaintiffs,

CITY OF NEW YORK, NEW YORK POLICE DEPT, PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, individually and in their official capacity as New York City Police Officers, JUSTIN VOLPE, CHARLES SCHWARZ,

ISSUED AS MANDATE
4/11/06

Order of the United States Court of Appeals for the Second Circuit, Dated April 3, 2006, Denying the Petition for Panel Rehearing

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date: 4/3/06

Docket Number: 04-5533-cv
Short Title: Louima (Roper-Simpson) v. City of New York
DC Docket Number: 98-cv-5083
DC: EDNY (BROOKLYN)
DC Judge: Honorable Sterling Johnso

At a state Term of the United States Court of Appeals for the Second Circuit held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of April two thousand.

Present:

Hon. Dennis Jacobs, CJ

Hon. Pierre N. Leval, CJ

Hon. Chester J. Straub, CJ

CIRCUIT JUDGES

A petition for panel rehearing having been filed herein by Appellant Casilda E. Roper-Simpson

Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

For the Court,
Roseann B. MacKechnie, Clerk

By: s/_____
Motion Staff Attorney

Letter, Dated May 23, 2004, From Schlam Stone & Dolan LLP to Magistrate Judge Cheryl L. Pollak with Copies to Michael S. Ross, Esq., K.C. Okoli, Esq. And Bradley D. Simon, Esq. Confirming The Resolution of the Fee Dispute Between Roper-Simpson and Thomas R. Figeroux

Appendix E

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JEFFREY M. EILENDER

REX CHEN
JOHN M. LUNDIN
ELIZABETH PRICKETT-MORGAN
LEAH M. CAMPBELL

May 23, 2003

BY FAX

Hon. Cheryl L. Pollak
United States Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Abner Louima, *et al.* v. City of New York, *et al*, 98-cv-5083 (SJJ)(CLP)

Dear Magistrate Judge Pollak:

We represent Brian Figeroux, Esq. and the law firm of Thomas & Figeroux in connection with the fee dispute among Mr. Louima's counsel in the above-referenced matter. We write to briefly advise the Court of a development that, in our view, narrows the issues before the Court for post-hearing resolution.

At page 9 of his recent submission, Mr. Okoli wrote that "it is no longer in dispute" that his client "has an enforceable oral fee-sharing agreement with the firm of Thomas &

Figeroux." The context of this assertion may be unclear, and it is criticized in Mr. Ross' brief at pp. 39-40. To provide appropriate context and avoid the unnecessary expenditure of judicial resources, this will confirm that Thomas & Figeroux has agreed not to contest Ms. Roper-Simpson's right to an equal one-third share in the net proceeds of this litigation.

Respectfully submitted,

s/_____
Thomas A. Kissane

Cc: Michael S. Ross, Esq.
(By fax)

K.C. Okoli, Esq.
(By fax)

Bradley D. Simon, Esq.
(By fax)